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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 604

UNITED STATES NATIONAL BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, FIRST NATIONAL TRUST & SAVINGS BANK OF SAN DIEGO, A NATIONAL BANKING ASSOCIATION, AND EMIL KLICKA,

Petitioners,

vs.

COUNTY OF SAN DIEGO, A QUASI MUNICIPAL CORPORATION, AND CROWELL D. EDDY, AS ASSESSOR OF SAN DIEGO COUNTY,

Respondents.

BRIEF IN OPPOSITION TO

PETITION AND SUPPORTING BRIEF FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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Respondents.

BRIEF IN OPPOSITION

TO

PETITION AND SUPPORTING BRIEF FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Come now the Respondents, County of San Diego, and Crowell D. Eddy, as Assessor of San Diego County, and present the following statement making against the jurisdiction of the above-entitled Court and in opposition to the Petition and supporting Brief of Petitioners filed pursuant to Supreme Court Rule No. 38.

Statement

Petitioners' statement of the statutes involved (Pgs. 4-5 their Brief) fails to include the statutes

upon which the decision of the state Court rests (R. 157), namely, Title IX, Part III of the Political Code, particularly Section 3617 thereof, and Sections 658 and 660 of the Civil Code. Section 3617 of the Political Code incorporates for taxation purposes the definitions of "real property" and "fixtures" as defined in Sections 658 and 660 of the Civil Code. *City of Pasadena vs. County of Los Angeles,* 182 Cal. 171; *Southern California Telephone Company vs. State Board of Equalization,* 12 Cal. 2d 127. And Sections 658 and 660 of the Civil Code are themselves declaratory of the common law. *City of Los Angeles vs. Hughes,* 202 Cal. 731. Hence the decision of the state Court declares that bank vault doors are "fixtures" and "real property" for local tax purposes, pursuant to the common law.

Plaintiff Emil Klicka and the Bank of America National Trust and Savings Association are erroneously included in the Petition for the Writ. (Pg. 6 Petitioners' Brief). Petitioner Klicka owns a vault (R. 136). Since he is not a national banking association, obviously he cannot raise in this Court alleged federal questions of immunity under R. S. 5219, particularly since he stipulated in the state Court (R. 143) and now concedes here (Pg. 6, Petitioners' Brief) that his vault is real property for tax purposes. Any so-called federal question he seeks to raise is moot. Surrender of the subject matter of the litigation leaves no controversy in respect of the issues relating thereto; *Meyer vs. Pritchard,* 131 U. S. CCIX Append., 23 L. Ed. 961; *Thatcher vs. Rockwell,* 105 U. S. 467, 26 L. Ed. 949. Likewise the Bank of America National Trust and

Savings Association cannot invoke the jurisdiction of this Court, since it was not a party to the record in the Court below (R. 134); *Bayard vs. Lombard,* 9 How. 530, 551, 13 L. Ed. 245, 254. Neither can Petitioners here champion the alleged rights of such third party; *McCabe vs. Atchison,* T. & S. F. R. Co., 235 U. S. 151, 162, 35 S. Ct. 69, 71, 59 L. Ed. 169; *Liberty Warehouse Co. vs. Burley Tobacco Growers' Co-op. Marketing Ass'n.,* 276 U. S. 71, 88, 48 S. Ct. 291, 294, 72 L. Ed. 473; *Henderson vs. Tennessee,* 10 How. 311, 323, 13 L. Ed. 434, 439; *Owings vs. Norwood's Lessee,* 5 Cranch 344, 3 L. Ed. 120; *Miller vs. National Bank of Lancaster,* 106 U. S. 542, 1 S. Ct. 536, 538, 27 L. Ed. 289.

BRIEF

Summary of Argument

1. The federal questions sought to be reviewed were not properly raised or preserved in the state Courts.

2. The decision of the state Court rests upon state grounds which independently and adequately support the judgment.

3. The case presents no substantial federal question.

ARGUMENT

I.

The federal questions sought to be reviewed were not properly raised or preserved in the state courts.

Petitioners seek to raise two federal questions: (1) denial of an immunity from local taxation of certain property owned by them, which immunity is claimed under the federal Constitution and the

federal statute R. S. 5219; and (2) the unconstitutionality of the Bank and Corporation Franchise Tax Act, on the ground that it is repugnant to the federal Constitution, Fourteenth Amendment, equal protection clause thereof, and to R. S. 5219.

As to the second question jurisdiction cannot be invoked since the question is raised for the first time in the petition for the Writ; *Hiawassee River Power Co. vs. Carolina-Tennessee Power Co.*, 252 U. S. 341, 344, 40 S. Ct. 330, 64 L. Ed. 601. The record does not otherwise disclose this question to have been raised in the state Courts, save perhaps by an allegation in the complaint (R. 3) that the local assessment of the vault doors as real property is double taxation. Such allegation is too general and ambiguous to constitute a proper raising of the question, and the supreme court decision does not consider or pass upon it (R. 153-162). Moreover such ambiguous reference may well have been to the prohibition against double taxation contained in the California Constitution (Article XIII, Sec. 1) or a similar prohibition in the Political Code (Sec. 3607). The particular clause in the federal Constitution, or the particular statute relied upon, and the rights claimed thereunder, must unmistakably appear; *Michigan Sugar Co. vs. Michigan,* 185 U. S. 112, 22 S. Ct. 581, 46 L. Ed. 829; *Bowe vs. Scott,* 233 U. S. 658, 664, 665, 34 S. Ct. 769, 58 L. Ed. 1141; *Porter vs. Foley,* 24 How. 415, 16 L. Ed. 740; *Saltonstall vs. Saltonstall,* 276 U. S. 260, 267, 268, 48 S. Ct. 225, 72 L. Ed. 565.

Likewise the first question was not properly raised or preserved in the state Courts. The fact

that the highest Court of the state discussed this question in its opinion (R. 161-162) is not sufficient. It is apparent from the record there was no real contest at any stage of the case on such federal point; *Morrison vs. Watson,* 154 U. S. 111, 115, 14 S. Ct. 995, 38 L. Ed. 927. The gist of the Court's comment in the opinion is that plaintiffs had raised the point, but failed to cite any authorities in support, thus constituting a waiver; *Harding vs. Illinois,* 196 U. S. 78, 84, 88, 25 S. Ct. 176, 49 L. Ed. 394. Moreover, such deficiency in the record is not cured or aided by raising the question in the briefs; *Live Oak Water Users' Ass'n. vs. Railroad Commission of State of California,* 269 U. S. 354, 357, 358, 46 S. Ct. 149, 70 L. Ed. 305; or by oral argument; *Live Oak Water Users' Ass'n vs. Railroad Commission,* supra; or by specific reference thereto in the dissenting opinion; *American Surety Co. vs. Baldwin* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298; *Baldwin vs. Anderson,* 50 Idaho, 606, 623, 299 P. 341; *Herndon vs. Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530; *Herndon vs. The State,* 179 Ga. 597, 602, 603, 176 S. E. 620; *York Heating & Ventilating Corporation vs. Malooly,* 296 U. S. 533, 56 S. Ct. 92, 80 L. Ed.—; *Malooly vs. York Heating & Ventilating Corporation,* 270 Mich. 240, 256, 258 N. W. 622. Such references constitute no part of the record for the purpose of determining jurisdiction of this Court. As for the testimony of the witnesses, the trial Court's opinion and the stipulation referred to (Pgs. 9-10 Petitioners' Brief) such matters, while part of the record, fall far short of raising specifically or by intendment the immunity question now urged. These matters relate to several incompetent and ir-

relevant federal statutes, rules, regulations, "constructions", customs and usages which the state Supreme Court has now twice summarily disposed of by final judgments that such classifications have no bearing on the character of the property for purposes of taxation; *Southern California Telephone Co. vs. State Board of Equalization,* supra; R. 162. Rulings by the state Court on such matters are conclusive and will not be made the subject of inquiry; *Grayson vs. Harris,* 267 U. S. 352, 357, 358, 45 S. Ct. 317, 69 L. Ed. 652; *Chicago & Alton R. Co. vs. Wiggins Ferry Co.,* 119 U. S. 615, 622, 623, 7 S. Ct. 398, 30 L. Ed. 519. Where the law is established by repeated and consistent decisions of a state Court, such established rules are regarded by the federal Courts, no less than by the state Courts themselves, as authoritative declarations of what the law is; *Burgess vs. Seligman,* 107 U. S. 20; *Bucher vs. Cheshire Railroad Co.,* 125 U. S. 555; *Quong How Wah Co. vs. Industrial Accident Commission,* 255 U. S. 445.

II.

The decision of the state Court rests upon state grounds which independently and adequately support the judgment.

The law of this case is that the common law rule of fixtures, which is codified in the state tax statute (Sec. 3617 Pol. Code) governs in classifying bank vault doors as real or personal property for the purposes of ad valorem taxation.

The trial court disregarded this mandate, declined to apply the law of fixtures to the evidence, which was without conflict on the question (R.

162), and rested its decision on the erroneous conclusion of law that Sections 61 and 84 of the Bank Act, an unrelated and irrelevant statute, applied in classifying the property for tax purposes (R. 145-146). The appellate Court upheld the trial court in error (Pg. 7, Petitioners' Brief). The Supreme Court on review corrected the error, applied the common law rule of fixtures to the uncontradicted evidence, found the vault doors to be real property for purposes of local taxation, and denied rehearing (R. 153-166). Thus the decision complained of was based on the non-federal ground of the common law, independently of any immunity or right claimed under federal statute R. S. 5219; "There is no federal general law."—*Erie Railroad Co. vs. Tompkins,* 304 U. S. 64. "The common law . . . always is the law of some state."—Holmes J. dissenting in *Southern Pacific Co. vs. Jensen,* 204 U. S. 205, 222. Such independent non-federal ground is broad enough and tenable enough to sustain the judgment, and is therefore adequate; *Ward vs. Board of County Comr's. of Love County, Okla.,* 253 U. S. 17, 22, 23, 40 S. Ct. 419, 64 L. Ed. 751. It is settled that this Court follows the state Court's declaration of its own law, whether common law or statutory; *Hawks vs. Hamill,* 288 U. S. 52, 57, 58; *Oklahoma Packing Co. vs. Oklahoma Gas & Elec. Co.,* 60 S. Ct. 215, 217; *United States vs. Robbins,* 269 U. S. 315; *Freuler vs. Helvering,* 291 U. S. 35. And particularly does this Court follow the common law of California as found and established by the Supreme Court of that state; *Erie Railroad Co. vs. Tompkins,* supra. Moreover, the determination as to what constitutes property and when it becomes

vested is altogether a matter of state law and is binding upon this Court; *Fox River Paper Co. vs. Railroad Comm.,* 274 U. S. 651, 47 S. Ct. 669, 71 L. Ed. 1279; *Talcott vs. United States,* 23 F 2d 897 (certiorari denied, 277 U. S. 604, 48 S. Ct. 601, 72 L. Ed. 1011); *Henggler vs. Allen,* 32 F 2d 69 (certiorari denied, 280 U. S. 594, 50 S. Ct. 40, 74 L. Ed. 642). And whether property is real or personal is to be determined according to state law; *Re Johns Mansville Sales Corporation,* 88 Fed. 2d, 520; *Willis vs. Beeler,* 90 Fed. 2d 538, certiorari denied 302 U. S. 717. Likewise whether property is properly classified as real or personal for taxation purposes is determined by state law; *Ledoux vs. Bee,* 83 Fed. 761, 765; *Savings & Loan Society vs. Multnomah County,* 169 U. S. 421, 18 S. Ct. 392, 42 L. Ed. 803; *Lewis vs. Monson,* 151 U. S. 545, 14 S. Ct. 424, 38 L. Ed. 265; 27 R. C. L. 50, n. 5 and cases cited. Where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the cause will be dismissed by this Court without considering any federal question that may also have been presented; *Municipal Securities Corp. vs. Kansas City,* 246 U. S. 63, 38 S. Ct. 224, 62 L. Ed. 579; *Bilby vs. Stewart,* 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701; *Dibble vs. Bellingham Bay Land Co.,* 163 U. S. 63, 69, 16 S. Ct. 939, 41 L. Ed. 72; *Eustis vs. Boles,* 150 U. S. 361, 366, 14 S. Ct. 131, 37 L. Ed. 1111; *Klinger vs. Missouri,* 13 Wall. (80 U. S.) 257, 263, 20 L. Ed. 635; *Harrison vs. Morton,* 171 U. S. 38, 47, 18 S. Ct. 742, 43 L. Ed. 63.

In this connection Petitioners urge (Pgs. 22-23 their Brief) that even under the common law rule

of fixtures applied by the state Supreme Court the vault doors are trade fixtures and hence personal property. Aside from the rules above noted that the state Court's determination of this question is conclusive, the point is without merit. In nearly every instance (nineteen of the 22 doors involved) the party installing the vault doors owns the building in which the same were installed (R. 159). There is no separate ownership, no relationship of landlord and tenant existing between the owners of these 19 doors and the owners of the premises to which they are annexed. Both annexed property and premises belong to one and the same person, respectively. Trade fixtures presuppose the relationship of landlord and tenant existing between the owner of the article annexed and the owner of the premises to which the article is annexed. Section 1019 of the Civil Code, the California trade fixture definition and rule, provides:

> A *tenant* may remove from the *demised premises,* any time *during the continuance of his term,* anything affixed thereto for purposes of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

As to the remaining 3 vault doors, granting they are on leased premises, and that separate ownerships exist, nevertheless it is established that even removable fixtures as well as trade fixtures once annexed constitute real property until severance; *United States vs. Stowell,* 113 U. S. 1, 10 S. Ct. 244,

33 L. Ed. 555; *Kutter vs. Smith,* 69 U. S. (2 Wall) 491, 17 L. Ed. 830; *Freeman vs. Dawson,* 110 U. S. 264, 28 L. Ed. 141; *Winslow vs. Merchants Ins. Co.,* 4 Met. 306; *Bliss vs. Whitney,* 9 Allen 114; *New York Life Ins. Co. vs. Allison,* 107 Fed. 179, cert. denied 181 U. S. 618; *Sampson vs. Camperdown Cotton Mills,* 64 Fed. 939. California follows this rule; *Merritt vs. Judd,* 14 Cal. 15; *Marks vs. Ryan,* 63 Cal. 107; *Earl vs. Kelly,* 21 C. A. 480; *Marker vs. Williams,* 39 C. A. 674; *San Francisco Breweries vs. Schurtz,* 104 Cal. 420; *McNally vs. Connolly,* 70 Cal. 3; *City of Los Angeles vs. Hughes,* 202 Cal, 731; *Bank of America vs. New York Life Insurance Co.,* 16 C. A. 2d 719; *Woods vs. Bank of Haywards,* 10 C. A. 93; see 26 Corpus Juris 697, sec. 83 for other jurisdictions in accord.

III.

The case presents no substantial federal question.

Since the decision complained of was based on independent and adequate non federal grounds, it follows that the case presents no substantial federal question.

However, there are other reasons why no federal question is presented.

Petitioners have stipulated and conceded away the vaults to which the vault doors here involved are annexed. (R. 143, pg. 6 their Brief). Hence there is no "case" or "controversy", no federal question as to them. But the vault doors are an integral part of the vaults. Together the vault and door constitute one vault structure, a unit for use; separated they fail in their intended purpose; both

functionally and physically the vault door is integrated with the vault itself, and thus together they constitute an improvement to the realty and hence real property, says the Supreme Court of this state (R. 159). And this principle is firmly established in California, in tax cases, as well as other cases; *Southern Calif. Tel. Co. vs. State Board of Equalization,* supra; *City of Los Angeles vs. Klinker,* 219 Cal. 198; *Woods vs. Bank of Haywards,* supra; *Bank of America vs. N. Y. L. Ins. Co.,* supra; *Realty Dock etc. Corp. vs. Anderson,* 174 Cal. 672. Consequently the surrender by Petitioners of the entire subject matter of the litigation, namely the vault structures, by stipulation and admission, is fatal and certainly forecloses pursuit of any part of such subject matter further as to possible federal questions involved; *Meyer vs. Pritchard,* supra; *Thatcher vs. Rockwell,* supra.

Moreover, Petitioners adopt the wrong theory concerning the federal statute, R. S. 5219. They persist in construing the act as a *grant* of power to the states to tax the real property of national banks, whereas the proper and established construction of the statute is that it constitutes but a *limitation* on an existing and otherwise plenary power of taxation which the states have always possessed.

Chief Justice Marshall recognized this inherent state right and declared the doctrine early in our national history, before the enactment of R. S. 5219, in the case of *McCulloch vs. Maryland*, 17 U. S. (4 Wheat.) 316, 436, when he said:

"This opinion does not deprive the states of any

> resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

And Congress in enacting R. S. 5219, has not merely expressly recognized that the right of the state and its political subdivisions to tax real property within the state includes the right to tax the real property of national banks, but by its specific injunction against any construction that could lead to exemption has insured the states against any impairment of that right. Witness the pertinent language of the section:

> "Nothing herein shall be construed to exempt the real property of (national banking) associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

To construe such language as a gift of a new power to taxing agencies which always had such power and to conclude therefrom that the grant must be construed strictly against the grantee, and that declaratory state laws enacted in its exercise are irrelevant and immaterial where federal questions of interpretation are involved, is at best an enfeebled construction.

It is a cardinal rule of statutory construction that where terms used in an Act of Congress are not de-

fined, and R. S. 5219 does not define the term "real property" used therein, they are to be given their generally accepted and common law meaning. In *Caminetti vs. U. S.,* 242 U. S. 470, 485-6, the Court declared that:

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

In *U. S. vs. San Jacinto Tin Co.,* 125 U. S. 273, 280, the Court held:

> ". . . though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law."

In common law jurisdictions fixtures, structures and improvements on the land are universally regarded as real property (61 Corpus Juris p. 188, sec. 149; p. 631, sec. 778).

The statutory provisions of California (Civil Code Sections 658 and 660) under which respondent county assessor classified the vault doors in question as real property and under which the highest Court of the state upheld his assessment, are themselves declaratory of the common law; *City of Los Angeles vs. Hughes,* supra.

Since Sections 658 and 660 of the Civil Code set forth the common law meaning of the term "real property" and since that term in R. S. 5219 must be

given its common law meaning, property like that in question which is real property within the meaning of Civil Code Sections 658 and 660 is likewise real property under R. S. 5219, and there is no federal question here involved.

CONCLUSION

Wherefore, it is submitted that this Court has no jurisdiction in this cause and that any federal question which may be presented is so unsubstantial as to merit no hearing by this Court.

Respectfully submitted,

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End